

STATE OF MICHIGAN
COURT OF APPEALS

KRISTINA FORCE and MATTHEW FORCE,

Plaintiffs-Appellees,

v

CITY OF OWOSSO,

Defendant-Appellant.

UNPUBLISHED

April 15, 2004

No. 245996

Shiawassee Circuit Court

LC No. 02-007569-NO

Before: O’Connell, P.J., and Jansen and Murray, JJ.

MURRAY, J. (*concurring*).

I concur in the majority opinion’s decision to reverse the trial court’s denial of defendant’s motion for summary disposition based on the prejudice defendant would suffer if plaintiffs were permitted to proceed despite their noncompliance with MCL 691.1404. *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996); *Hobbs v Dep’t of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976). However, as defendant has aptly argued, I respectfully believe that the Supreme Court’s decision imposing a prejudice requirement in determining whether the notice provisions of the governmental immunity statute apply has no basis under the statute or Constitution. Indeed, as Justice Riley stated in her dissent in *Brown, supra* at 369-374, “the requirement of prejudice engrafted upon the statutory notice provision by *Hobbs*[, *supra*],” has no basis within the plain language of the statute. *Id.* at 369. There is no prejudice requirement provided by the Legislature in this statute. To the contrary, the statutory language is plain, unequivocal, and simple. In order to bring a claim under the highway exception to the governmental immunity statute, MCL 691.1402, the Legislature has provided that a plaintiff must “within 120 days from the time the injury occurred . . . serve a notice on the governmental agency of the occurrence of the injury and the defect.” MCL 691.1404. Because we are an intermediate appellate court, we must apply the prejudice standard of *Brown* and *Hobbs*, which the majority has correctly done. However, for the reasons stated by Justice Riley in her *Brown* dissent, I believe that the Court improperly added a prejudice requirement into the statute where none exists. Once the statute has been constitutionally upheld under a rational basis test, the statute must be enforced as written. *Brown, supra* at 370-372.¹

/s/ Christopher M. Murray

¹ Justice Boyle also concurred in Justice Riley’s dissent. *Brown, supra* at 374.